No. 78-1861

In the Supreme Court of the United States

OCTOBER TERM, 1978

MIKE YUROSEK & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BUTCHERS UNION LOCAL 193 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-6) is reported at 597 F. 2d 661. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 7-20) is reported at 227 N.L.R.B. 1936. The Board's decision in the related representation proceeding (Pet. App. 21-29) is reported at 225 N.L.R.B. 148.

JURISDICTION

The decision of the court of appeals was entered on January 22, 1979. A petition for rehearing was denied on

May 3, 1979. The petition for a writ of certiorari was filed on June 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly rejected petitioner's argument that a union representation election should be set aside because during the campaign two employee union supporters told other workers that, if the union lost the election, immigration officials would deport illegal aliens among petitioner's employees.

STATEMENT

1. Pursuant to a representation petition filed by respondent Butchers Union Local 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO ("the Union"), the Board conducted an election among petitioner's employees. The Union won, 132-97 (Pet. App. 21).[1] Petitioner filed timely objections to the election contending, *inter alia*, that the election should be set aside because employee organizers had threatened that the Union would report illegal alien employees to the federal government and thereby cause their deportation if the Union lost (Pet. App. 22-23).[2]

On September 11, 1975, after two days of hearings, a Board hearing officer issued a report recommending that petitioner's objection be sustained and a new election be ordered (Pet. App. 21-22). The hearing officer based his

[1]An intervening union, Local 87 of the General Teamsters and Food Processing Union, received no votes. Twenty-eight ballots were challenged but, because the outcome of the election would not have been affected even if all the votes had gone against the Union, the challenges were not resolved (Pet. App. 4 n.1, 21).

[2]Petitioner's other objection to the election was overruled and is not now at issue (Pet. App. 6, 21-22).

recommendation on findings that employees Lupe Villalobos and Maria Papion (two of the six members of the Union's voluntary in-plant organizing committee) and another unidentified person made statements to eligible voters to the effect that, if the Union did not win the election, immigration authorities would deport those Mexican aliens who were illegally in the country. Although the hearing officer found that the two committee members were not acting as agents of the Union, he concluded that, in light of the ethnic composition of the electorate and immigration authorities' previous visit to the plant, the election should be set aside (Pet. App. 23-24; R. 144).[3]

The Board's Regional Director disagreed with the hearing officer's conclusion. The Regional Director observed that other members of the organizing committee told the employees that the Union would not seek anyone's deportation and that an International representative of the Union, addressing a well-attended organizational meeting, stated that it did not matter to the Union if some employees were illegal aliens (Pet. App. 24). The Regional Director concluded that these statements sufficiently disavowed any earlier threat that the Union would call immigration officials and thereby "tended to neutralize any atmosphere of fear that otherwise might have been engendered by the third party conduct" (*ibid.*). The Regional Director therefore overruled petitioner's objection and certified the Union as the employees' bargaining representative (*ibid.*; R. 187-190).

[3]"R." refers to the volume of pleadings filed in the court of appeals. "Tr." refers to the transcript of the hearing on petitioner's objections to the election.

The Board sustained the Regional Director's decision to certify the Union (Pet. App. 24-29). The Board explained (*id.* at 28):

> While the record evidence is too ambiguous to support the Regional Director's conclusion that the Union disavowed the threats made herein, we note from the testimony of others who assisted in the organizational campaign that substantial efforts were made by them to disabuse employees of the idea that the Union would call the Immigration authorities if it lost the election. To this extent, the impact of the threats and rumors was lessened. In any event, we believe illegal aliens naturally experience some fear of detection and deportation as a consequence of their unauthorized presence in the U.S., and we doubt that the threats and rumors herein, considering their source, so exacerbated these fears as to render any illegal alien employees incapable of exercising a free choice in the election.

2. Petitioner subsequently refused to bargain with the Union. The Union filed charges and the Board issued an unfair labor practice complaint. On motion for summary judgment, the Board ruled that petitioner had violated Section 8(a)(5) and (1) of the Act and entered a bargaining order (Pet. App. 7-20).

3. The court of appeals enforced the Board's order (Pet. App. 3-6). The court noted that "[w]here some members of the bargaining unit are aliens, we do not find it surprising that rumors might circulate concerning potential government investigation of those whose lawful status in this country is open to some question" (*id.* at 5). The court further observed that the record contained evidence "that the union heard the rumor and clarified its position on the issue" (*ibid.*). More important, in the

court's view, the record did not include sufficient evidence to link the controversial statements of union supporters directly to the Union or its agents (*ibid.*). Under these circumstances, the court concluded (*id.* at 6; citation omitted), "the Board's determination is supported by substantial evidence and accordingly should not be set aside. The record does not establish, as a matter of law, that the freedom of choice of the employees was significantly impaired by the representations that were made."

ARGUMENT

The decision of the court of appeals is correct, and the primarily factual question whether the statements of employee organizers should be attributed to the Union does not merit review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Congress has vested the Board with a "wide degree of discretion" in representation matters. *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330-331 (1946). In exercising this discretion, the Board does not give the same weight to conduct by third persons as to conduct attributable to a union or an employer. A statement by a third party "tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions." *Orleans Mfg. Co.*, 120 N.L.R.B. 630, 633 (1958). Accord, *NLRB* v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867, 870 (8th Cir. 1972), and cases there cited; *Intertype Co.* v. *NLRB*, 401 F. 2d 41, 46 (4th Cir. 1968), cert. denied, 393 U.S. 1049 (1969).

Petitioner apparently does not contend that, even if the employee organizing committee was not an instrumentality of the Union, the threats of deportation uttered by

some committee members would have been sufficient to impair employee free choice in the election.[4] Rather, petitioner argues that the Board erred in finding that the organizing committee members' statements were not attributable to the Union.

But, as the court of appeals held (Pet. App. 6), substantial evidence supports the Board's finding. The voluntary organizing committee was not an arm of the Union. It was, instead, a group of employees who independently sought out the Union and subsequently distributed union authorization cards, solicited signatures, and answered some employee questions (Pet. App. 23; R. 143, 145, 228; Tr. 230, 261, 266-267, 328-329, 351-353, 369-370, 380, 383). Moreover, the committee did not speak with a single voice. Committee member Magdelena Gomez, in response to " 'rumors about people being scared that if the Union came in, the Immigration would come in, or if it did not come in, the Immigration would come in,' " told employees that "the Union's purpose was not to get rid of anybody or call Immigration" (Pet. App. 26-27; R. 141, 231; Tr. 369, 370). And committee member Alicia Rocha told fellow employees that the Union officers said that all employees were equal and that it made no difference whether petitioner's workforce included illegal aliens. Rocha openly opposed employees who wished to report illegal aliens to the authorities (Pet. App. 26; R. 141, 231; Tr. 321-323, 330, 345-346, 350, 360-361). Finally, wholly apart from the activities of the committee, Union officials and union members employed at another company were actively involved in the election

[4]Third party conduct will result in setting aside an election only where it results in an " 'atmosphere of fear of reprisal such as to render a free expression of choice impossible.' " *NLRB* v. *Sauk Valley Manufacturing Co.*, 486 F. 2d 1127, 1132 n.5 (9th Cir. 1973).

campaign, and, in response to questions from employees, assured them that the Union did not care whether employees were illegal aliens, but would represent the interests of all employees (Pet. App. 25-26; Tr. 276-277, 280-281, 289-293, 304, 306-307, 311-313, 377, 381-382, 387, 388). In these circumstances, the Board justifiably concluded that the statements of Villalobos and Papion were not attributable to the Union and did not preclude a fair election.

The present case is distinguishable from *NLRB* v. *Georgetown Dress Corp.*, 537 F. 2d 1239, 1243-1244 (4th Cir. 1976), on which petitioner relies. In that case, the offending organizing committee members were the union's *only* in-plant contact with the employees, and the union made no effort to disavow misdeeds by committee members. In the eyes of other employees, the committee members were the representatives of the union on the scene and the union authorized them to occupy that position. *NLRB* v. *Urban Telephone Corp.*, 499 F. 2d 239, 241, 243-244 (7th Cir. 1974), is similarly distinguishable. There, the offending employee was one of three "contact" people selected by the union, and the union made no effort to disavow the improper conduct. Here, by contrast, Villalobos and Papion were not closely aligned with the Union, and their statements were contradicted by fellow committee members. Moreover, although the record does not show an express disavowal by the Union itself, it does demonstrate that, when employees inquired of Union representatives concerning the Union's intentions with respect to illegal aliens, the representatives assured the employees that the Union did not want to deport such aliens and "would protect them as much as [it] would anybody else" (R. 141, 230; Tr. 281, 377, 381, 382, 387, 388).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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